

Conclusion

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This symposium on the Protection of People Fleeing Armed Conflict was organized by the Law Faculty of the University of Luxembourg jointly with the United Nations High Commissioner for Refugees (UNHCR) in October 2014. It followed a previous conference on *Droit d'asile au Grand-Duché de Luxembourg et en Europe: Développements récents* held in 2009, which was also organized by the University of Luxembourg and the UNHCR.

The subject of the symposium is timely for multiple reasons. Dealing with the flow of refugees and people in need of international protection is increasingly a priority for the European Union while member states cope with this issue on a daily basis. The continuing crisis in Syria necessitates engaging in a political and academic debate on the protection of people fleeing armed conflicts. Additionally, the UNHCR is in the process of developing new Guidelines for the Protection of People Fleeing Violence and Conflict across Borders. Finally, recent developments in the related case law of the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU) and national courts render the discussion opportune. The campus of the University of Luxembourg provided the apt environment for such a discussion to take place with the participation of judges from both the CJEU and the ECtHR, UNHCR practitioners and lawyers, academics and students. The Symposium was divided in two sessions. The first session was dedicated to the theoretical and jurisdictional framework on the issue of the protection of people fleeing armed conflicts. An overview of the concepts and definitions associated with both refugee status and complementary or subsidiary forms of protection was also presented by ECtHR and CJEU judges. The second session focused on the crisis in Syria with presentations from both academics and practitioners. The Dean of the Law Faculty confirmed the significance and the timeliness of the event in his opening remarks.

As the UNHCR Deputy Regional Representative for Western Europe Paolo Artini underlined, over the past 60 years the 1951 Refugee Convention and its Protocol have remained the principal instruments for the protection of people fleeing armed conflict, while regional instruments, such as the 1969 OAU Refugee Convention, may provide a broader definition of refugee, thus providing a broader protection. On an EU level, the Qualification Directive offers

protection to people fleeing indiscriminate violence in international or internal armed conflicts. However, the EU member states do not apply the Directive's legal standards uniformly, leading to different interpretation of the refugee definition provided in the 1951 UN Convention. In this respect, Artini pointed to the 2011 UNHCR study 'Safe at Last', which mapped the state practice of some EU member states on granting refugee status. Artini concluded by stressing the need of dialogue between the different jurisdictions which adjudicate cases related to refugees (ECtHR and CJEU) and the need to strengthen the legal instruments for the protection of refugees globally.

CJEU Advocate General Eleanor Sharpston took the floor afterwards by inviting the participants to consider two different aspects of the Symposium's subject-issue; the problems of the individual who is in need of international protection when finally arriving at the destination country and the problems faced by the state authorities when assessing asylum applications. Both perspectives present difficulties and challenges for different reasons, as explained by the Advocate General. CJEU Judge Lars Bay Larsen, spoke more precisely about the problem of assessing the 'risk' in cases of people fleeing armed conflicts under the EU Qualification Directive scheme. This assessment is twofold. It is first an assessment of the facts, and then their subsumption to the rule, with the objective of determining whether there is fear of persecution or a risk of suffering serious harm. In the judge's presentation there is a review of the CJEU case law related to the legal standards that national authorities apply when assessing asylum applications. Accordingly, the CJEU has not yet adjudicated on the standard applied for establishing the facts linked to a risk associated with an armed conflict. The result of the EU Qualification Directive is that states have the discretion to procedural autonomy in this respect (that is the first step of assessment). There is, however, relevant case law from the CJEU regarding the legal characterization of the facts, specifically, the subsidiary protection as laid down in Article 15 (c) of the Qualification Directive. This paragraph refers to a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict' and covers a more general risk compared to the other two paragraphs of the same Article.

In particular, two CJEU cases are relevant. In the *Elgafaji* judgment the court indicated the ratio between the threat to the concerned individual and the indiscriminate violence. As put eloquently by judge Larsen, 'the higher the level of indiscriminate violence, the lesser the

emphasis on the individual character of the threat'. And the reverse is equally valid. The more the applicant is in position to prove that he is specifically affected by a conflict, the lower the level of indiscriminate violence is required to be proven in order for him to be eligible for protection. In the *Diakité* case, the CJEU developed further the concept of indiscriminate violence. The court did not accept the definition of the internal armed conflict as provided in international humanitarian law by opting for a broader definition, according to the CJEU judge.

In his following presentation, ECtHR judge Ledi Bianku, explained why the asylum cases concerning people fleeing armed conflicts are most challenging before the ECHR. Three main reasons were identified. Firstly, these cases usually require an assessment of a situation found outside the territory of member states. Secondly, there is a lack of sufficient information on the situation prevailing in the country of origin of the asylum seeker. Thirdly, there is the need for expeditious procedure when the applicant is waiting to return to his country of origin. After these observations, the judge continued with a short review of the ECtHR case law on the matter.

The first session ended with a presentation by the UNHCR Senior Legal Coordinator Alice Edwards, who gave a comprehensive analysis on the key legal challenges when applying the 1951 UN Refugee Convention to people fleeing armed conflicts. Edwards referred to the process of updating the UNHCR guidelines on international protection of refugees. She then identified three main challenges to the proper interpretation of Article 1A(2) of the 1951 UN Refugee Convention. The first challenge concerns false perceptions about the scope of the 1951 Convention. The second problem refers to the application of refugee definitions found in regional instruments such as the EU Qualification Directive. The third challenge is connected with the constant changing character of armed conflicts. Edwards criticized the restrictive views of the refugee definition of the 1951 UN Convention and more precisely the view that a refugee has to prove a higher level of fear of persecution when he flees an armed conflict.

Subsequently, Professor James Sweeney addressed two key issues relating to the subject of the Symposium: a) the UK's reluctance to participate in the UN's resettlement scheme for Syrian refugees and b) the role of 'credibility' in assessing asylum applications. Sweeney highlighted that humanitarian aid should not be bartered by states in exchange for deviating from their international obligations to grant international protection to people fleeing armed conflict. 'Aid is not a functional equivalent to protection', as put eloquently by Sweeney, when criticizing the UK's stance on the issue. The second issue raised in Sweeney's presentation is that of

credibility. Two problems were identified. The quality of credibility assessments is very poor in Europe and the problematic view of credibility as a legal tool in applications for international protection. Sweeney's analysis was very thorough on both issues.

UNHCR Chief of the Refugee Status Determination Section, Blanche Tax, also took the floor during the second session and focused on the crisis in Syria. Tax highlighted that individuals in Syria are targeted because they are vaguely associated (as neighbors, family members, or even residents of the same village) with opposing armed forces. The risk of harm for these people is very high even if they are not targeted on an individual basis. Tax's participation contributed to the understanding of particular dynamics of the Syrian conflict where people flee generalized violence.

The perspective of a member state was given by the former President of the Belgian Council for Aliens Law Litigation, Serge Bodart. Bodart referred to the test of credibility through the ECtHR case law and highlighted the role of the court in harmonizing the different standards applied by national judges contributing to a common jurisdiction on assessing asylum applications. The third part of his presentation focused on the identification of the persecutors through the perspective of France, Germany and Belgium. Bodart then moved on with the definitions of armed conflict and indiscriminate violence and he highlighted the contradiction of the terms mentioned in Article 15 (c). Although in the Elgafaji judgment, the CJEU clarified this provision, clear standards for evaluating indiscriminate violence are lacking. Moreover, Bodart very clearly distinguished the notion of internal armed conflict under international humanitarian law from the one adopted by the CJEU. The difference between the two definitions are centered on the words 'prolonged' and 'organised' armed conflict but, according to Bodart, this difference in terms does not change much.

The discussion that followed the conclusion of the second session was stimulating and informative. The participants paid particular attention to the relationship between the CJEU and the ECtHR. Judges Larsen and Bianku argued that the CJEU's interpretation of the EU Qualification Directive Article 15(c) in Elgafaji case influenced the ECtHR interpretation of Article 3 of the European Convention of Human Rights (ECHR). Although there is no obligation for the two courts to adopt a similar stance, the ECtHR in *Sufi and Elmi* case followed the reasoning of the CJEU. Furthermore, during the discussion it was concluded that it is ultimately up to the European legislator to update the protection offered by the EU Qualification Directive

in a way which better reflects the interpretation given by the CJEU. The concluding remarks were given by the UNHCR Head of Policy and Legal Support Unit, Philippa Candler and Professor Matthew Happold.

As a sequel to the 2009 conference, this symposium offered the opportunity to advance dialogue and debate among judges, practitioners, UNHCR officials and academics in the centre of Europe. It also solidified the collaboration between the University of Luxembourg and the UNHCR and confirmed their strong commitment to advancing a better understanding of the multiple legal and political challenges facing people fleeing armed conflicts.